# In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-874

ARTHUR M. JOHNSTON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of having sold barbiturate capsules in violation of 21 U.S.C. (Supp. V) 331(q)(2) (counts 1, 3, 4 and 6) and of having possessed barbiturate capsules for the purpose of sale in violation of 21 U.S.C. (Supp. V) 331(q)(3).[1] He received consecutive sentences of imprisonment for one year on counts 1-3; imposition of sentence was suspended on counts 4-7, and

[1] Petitioner was found guilty of the same offenses at an earlier trial. The court of appeals set aside that first conviction on the ground that prejudicial evidence had been improperly received. 426 F. 2d. 112.



494-509—73

he was placed on probation for five years. He was fined $1,000 on count one. The court of appeals affirmed (Pet. App. A).

At trial the government's principal witness, Kenneth Wolfe, an Indiana State Police officer, testified that on August 18, 1967, he and one Ernest Powell, who was in custody awaiting sentencing for various state offenses, went to petitioner's house in Gary, Indiana. Powell, who knew petitioner, introduced Wolfe as "Ken" without identifying him as a police officer (Tr. 105–107, 109, 114–116, 170–174). Petitioner asked Powell and Officer Wolfe what they had for him, and Wolfe handed him a box of assorted small appliances which were purportedly stolen goods (Tr. 108–109). Petitioner inspected the appliances and estimated their retail value to be 470 dollars. He then paid Powell 141 dollars (thirty per cent of the retail value) for the merchandise (Tr. 110–111).

After the transaction was completed, petitioner and Powell discussed narcotics. Petitioner told Powell that he no longer dealt in "stuff"[1] because a local police officer had warned him that one of his narcotics customers was a police informant (Tr. 114–115). Petitioner then remarked, "I could get you some phenobarbital if they would help" (Tr. 115). Powell and Officer Wolfe declined this offer (Tr. 115).

On August 19, the following day, Powell and Officer Wolfe returned to petitioner's house with another box of merchandise, which petitioner bought for thirty per cent of its estimated retail value (Tr. 118–120). After

[1] "Stuff" means heroin in the argot of narcotics dealers (Tr. 198).

petitioner paid for the merchandise, Powell told him that he needed some "stuff" for his "boosting broad"[1] because she was "up tight" and "wasn't doing her thing." Petitioner replied that he was not dealing in "stuff" anymore because it was "too hot to handle," but added that he had something else (Tr. 121–122). He went upstairs and returned with eight capsules of sodium pentobarbital, a barbiturate, which he handed to Powell. Powell paid petitioner one dollar for the capsules, and left with Wolfe (Tr. 123–124).

On August 21 Officer Wolfe and Powell returned to petitioner's house and sold him more ostensibly stolen merchandise (Tr. 127–129). Powell told petitioner that the barbiturate capsules had helped his "boosting broad" and asked for more of the drug (Tr. 130). Petitioner sold him thirty capsules for 25 dollars (Tr. 131).

On August 22, 1967, Officer Wolfe and Powell returned to petitioner's house and sold him more merchandise (Tr. 133–134). After petitioner paid for the goods, Powell handed him 10 dollars and asked for more barbiturates (Tr. 134–135). Petitioner gave Powell twenty capsules (Tr. 136). By pre-arrangement, Officer Wolfe and Powell began arguing with each other (Tr. 135). Wolfe asked Powell for some of the capsules he had just purchased. When Powell refused to give any to Wolfe at that time, Wolfe told petitioner he was tired of having to buy the capsules through Powell and said that he wished to buy them

[1] "Boosting broad" is an underworld term for a female professional shoplifter (Tr. 122).

directly from petitioner. Petitioner then sold Officer Wolfe twenty-seven capsules for 20 dollars (Tr. 136).

On August 23, Officer Wolfe and Powell returned to petitioner's house and sold him more merchandise (Tr. 138). Powell again told petitioner that he wanted to buy barbiturates and handed him 25 dollars. Petitioner asked Officer Wolfe whether he too wanted more capsules. He told Wolfe that he would give him a good price this time and Wolfe gave him 25 dollars (Tr. 140). Petitioner left the room and returned shortly with two bottles, one containing two hundred barbiturate capsules and the other ninety-seven (Tr. 140–142, 147). As petitioner handed one bottle to Powell, Powell told him that Wolfe was a police officer (Tr. 144). Wolfe drew his gun and arrested petitioner (Tr. 145).

1. Petitioner argues that he was entrapped as a matter of law.[4] To establish entrapment as a matter of law, the evidence must show more than that government agents afforded opportunities and facilities for the commission of the offense. *Osborn* v. *United States*, 385 U.S. 323, 331–332; *Sherman* v. *United States*, 356 U.S. 369, 372–373; *Sorrells* v. *United States*, 287 U.S. 435, 441. There can be no entrapment unless government agents implant in the mind of an innocent person, through persuasion or persistent solicitation, the disposition to commit the alleged offense. *Sherman, supra*, 356 U.S. 372; *Sorrells, supra*, 287 U.S. at

[4] The court of appeals had held, in its decision setting aside petitioner's first conviction on other grounds, that petitioner was not entrapped as a matter of law. 426 F. 2d 112, 114.

442. Here petitioner himself first raised the subject of barbiturates and suggested to Powell and Officer Wolfe that they buy the drug from him. Powell and Wolfe initially rejected petitioner's offer to sell barbiturates and did not purchase any from him until he repeated the offer the next day. In these circumstances the court below properly rejected petitioner's contention (Pet. 11) that the evidence incontrovertibly showed entrapment.[5]

2. Petitioner raises additional arguments concerning (1) the unavailability of Powell at the time of the second trial and (2) a remark made by the prosecutor in his closing argument to the jury, which petitioner construes as a comment on his failure to testify in his own behalf. These contentions are answered in the opinion of the court of appeals (Pet. App. 3–5), upon which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

FEBRUARY 1973.

---

[5] The government has recently sought review from three decisions by courts of appeals involving entrapment issues. *United States* v. *Russell*, certiorari granted October 16, 1972, No. 71–1385; *United States* v. *McGrath*, petition for writ of certiorari pending No. 72–761; and *United States* v. *Knight*, petition for certiorari pending No. 72–965. The issues in those three cases involve the question whether the defense of entrapment may be asserted on the ground that the degree of governmental participation is an independent and controlling criterion even though the defendant was predisposed to commit the crime. The instant case does not involve this question and there is thus no cause to consider it together with these three cases.

U.S. GOVERNMENT PRINTING OFFICE: 1973